Supreme Court, U.S.
FILED
OCT 13 1995

(2)

No. 94-1881

In the Supreme Court of the United States

OCTOBER TERM, 1995

BENNIE COLLINS, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Office of Personnel Management erred in declining to permit petitioner to rescind a written election made at the time of his retirement, when the election was not the product of government error or misinformation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 45 F.3d 1569. The final order of the Merit Systems Protection Board (Pet. App. 18-19) is unreported, but the decision is noted at 63 M.S.P.R. 69 (Table). The opinion of the Administrative Judge (Pet. App. 20-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1995. The petition for a writ of certiorari was filed on April 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner retired from the military in 1968 after 20 years of active service; he retired from his subsequent civilian position with the government in 1988, at age 57. Pet. App. 4. At the time of his civil service retirement, petitioner executed a standard form (OPM Form 1515), entitled "MILITARY SERVICE DEPOSIT ELECTION." *Ibid.* This form stated:

> Our records indicate that you * * * had military service after 1956 and are eligible for a civil service annuity. If you are eligible for a Social Security benefit which includes credit for this military service (or will be eligible at age 62) you must either make a deposit for the military service to the Civil Service Retirement System *or your civil service benefits will be reduced at age 62* unless you are eligible for a guaranteed minimum annuity.

Id. at 4-5 (emphasis added).

The election form also explicitly cautioned petitioner to read an attached information sheet "carefully to be sure you understand the consequences of not making the [required] deposit for military service." Pet. App. 5. The attachment informed petitioner that he "ha[d] the option of either: (1) making the deposit and thereby avoiding a reduction in [civil service retirement] annuity at age 62 * * *, when the military service is credited for Social Security purposes, or (2) not making the deposit and having the annuity adjusted at 62." *Ibid.*

Petitioner signed the election form, indicating that he had read the "information concerning [his] rights

to make deposit for post-1956 military service" and that he had "decided *not* to make (or complete) this deposit." Pet. App. 6. Petitioner thus chose, at the time of his retirement, not to make the deposit and to have his civil service retirement annuity reduced at age 62 when his military service would be credited for social security purposes. *Id.* at 7-8.

2. In 1993, after petitioner became 62, OPM recomputed his civil service retirement annuity as required by law, see 5 U.S.C. 8332(j), and his annuity was reduced from $1390 to $845 per month. The social security benefit of $268 per month he began receiving at age 62 is smaller than this reduction in his annuity. Pet. App. 8. Petitioner requested permission to make the required deposit in order to retain credit toward his civil service retirement annuity for his post-1956 active military service. OPM denied this request because there was no evidence that government error was responsible for petitioner's failure to submit the deposit at the time of his retirement. *Id.* at 30-34.

3. The Merit Systems Protection Board (MSPB) affirmed. Pet. App. 20-29. The Administrative Judge (AJ) found that neither the statute nor its implementing regulations "requires either pre-separation counseling concerning or notice of the potential impact of the statutory and regulatory provisions." *Id.* at 26-27. Moreover, although petitioner testified that he never understood the ramifications of his 1988 election, the AJ rejected petitioner's testimony as "lacking in credibility" and found that, "before electing not to make a deposit, [petitioner] was clearly on notice of the consequences of such an action." *Id.* at 26. The Board denied petitioner's

petition for review, making the decision of the AJ final. *Id.* at 18-19.

4. The court of appeals affirmed. Pet. App. 1-11. The court found no basis for reopening the matter, reasoning that "unilateral mistake in signing an unambiguous election form that notifies the signer of the consequences of election" is not a ground for voiding a freely made election. *Id.* at 10. The majority believed that this "view is in harmony with and promotes the settled proposition that one is not relieved from the consequences of a written election absent a showing that mental incompetence, duress or fraud is the reason for an election one later seeks to void." *Id.* at 10-11. Judge Newman dissented on the ground that petitioner lacked the information necessary to exercise informed consent. *Id.* at 12-17.

ARGUMENT

Petitioner's case centers on his failure to take advantage of a statutorily authorized procedure to avoid what Congress has called "Catch-62." See S. Rep. No. 504, 97th Cong., 2d Sess. 231 (1982). Prior to 1982, a federal employee's civil service retirement annuity was reduced when the employee reached age 62 if the employee had served in the military after 1956 and if those post-1956 years of military service had been used in calculating the employee's total government service for purposes of his or her retirement annuity. *Ibid.*; see 5 U.S.C. 8332(j). The rationale for this reduction was that post-1956 military years are automatically creditable for purposes of Social Security. Without the reduction, employees reaching age 62 (when social security eligibility begins) would receive credit in two retirement systems for the same years of service. On the other hand,

"[t]he additional social security benefit gained for these years of military service often [did] not match the reduction in the civil service annuity." S. Rep. No. 504, *supra*, at 231.

In dealing with this problem, Congress chose not to eliminate the age 62 retirement-annuity reduction in its entirety. Instead, in 1982 Congress enacted a statutory procedure that employees could use to avoid the reduction if they so chose. Under the new system, an employee can receive credit for post-1956 active military service under both the civil service *and* social security systems (and thus avoid a reduction of the civil service annuity at age 62) by depositing a sum equal to 7% of the employee's total post-1956 military pay to the Civil Service Retirement and Disability Fund. See 5 U.S.C. 8334(j).

The Office of Personnel Management (OPM) has promulgated regulations implementing this statutory procedure. Under those regulations, an annuity applicant must make the required deposit "prior to final adjudication of the application for retirement or survivor benefits." 5 C.F.R. 831.2107(b)(1); see also 5 C.F.R. 831.2104(b), 831.2105(b); *Holtermann* v. *OPM*, 57 M.S.P.R. 380, 384-385 (1993). This adjudication ordinarily occurs at the time of retirement. If the deposit is not made at that time, the amount of the civil service retirement annuity will be reduced when the employee reaches age 62 unless the deposit requirement is subsequently waived.

1. Petitioner retired at age 57, did not make the required deposit, and was surprised to learn, five years after retirement, that his failure to make the deposit had a negative effect on his total retirement income. Petitioner argues (Pet. 9-15) that he did not make an informed decision not to make the 7% deposit

at retirement because the OPM Form "says nothing about the real effects of the election made thereon" (Pet. 10).

It is true that OPM Form 1515 and its attached information "do not include annuitant specific calculations, such as * * * the number of dollars by which the annuitant's civil service benefits will be reduced at the time of eligibility for Social Security benefits if the annuitant fails timely to make the required deposit," Pet. App. 5, even though such information is available at the time of an employee's separation. The form and its attachment do, however, "give unmistakable notice that a person's annuity will be reduced at age 62 if no deposit has previously been made to earn entitlement to the benefit of post-1956 military service." *Id.* at 5-6. The election form thus warned petitioner to read the attached information "carefully to be sure you understand the consequences of not making the deposit for military service," *id.* at 5, and the attached information informed petitioner that his civil service retirement annuity would be reduced when he reached age 62, unless he deposited 7% of his post-1956 military pay at retirement. Although petitioner was not given information about the amount of the reduction, he was put on notice that a decision not to make a deposit might have negative financial consequences.

We are not aware of any statute or regulation requiring OPM (or the employing agency) to provide annuitants with more specific information than was given to petitioner. Pet. App. 11. In similar contexts, courts have found that they do not have the authority to add notice requirements to statutes when Congress has declined to impose such requirements. See, *e.g.*, *Templeton* v. *OPM*, 951 F.2d 338, 340 (Fed. Cir.

1991); *Davis* v. *OPM*, 918 F.2d 944, 946-947 (Fed. Cir. 1990); *Nordstrom* v. *United States*, 342 F.2d 55, 59 (Ct. Cl. 1965).

2. Petitioner also argues (Pet. 14-16) that OPM erred in not permitting him to pay the 7% deposit (with interest) five years after his retirement. OPM does not, however, have the general discretion to waive a regulatory requirement.

The MSPB has determined that only three circumstances authorize OPM to waive a requirement established by regulation: (1) the regulation itself permits waiver; (2) the agency engaged in affirmative misconduct; or (3) the agency failed to provide notice of rights, if such notice is required by statute or regulation. See *Speker* v. *OPM*, 45 M.S.P.R. 380, 385 (1990), aff'd, 928 F.2d 410 (Fed. Cir. 1991) (Table). The court of appeals held that "the pertinent regulations do not provide any opportunity for waiver of the deposit-making deadline dates. [Petitioner] makes no claim that agency misconduct caused his 'mistaken' election, and the pertinent statutes and regulations do not require that notice be given to the annuitant." Pet. App. 9-10; accord *Holtermann* v. *OPM*, 57 M.S.P.R. at 384-385. OPM informs us that it does not grant waivers when none of those three circumstances is present. The MSPB thus properly sustained OPM's refusal to grant the requested waiver in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1985